

ESTTA Tracking number: **ESTTA202279**

Filing date: **04/02/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91182604
Party	Defendant Vision Pharma LLC
Correspondence Address	S. BENJAMIN PLEUNE ALSTON & BIRD LLP BANK OF AMERICA PLAZA 101 S. TRYON STREET, SUITE 4000 CHARLOTTE, NC 28280-4000 ben.pleune@alston.com
Submission	Answer and Counterclaim
Filer's Name	Noelle T. Valentine
Filer's e-mail	noelle.valentine@alston.com, jason.sneed@alston.com, bensidbury@alston.com
Signature	/Noelle T. Valentine/
Date	04/02/2008
Attachments	Vision Pharma Answer_20080403043148.pdf (8 pages)(278377 bytes)

Registrations Subject to Cancellation

Registration No	3384232	Registration date	02/19/2008
Registrant	Cornerstone Biopharma, Inc. Suite 255 2000 Regency Parkway Cary, NC 27518 UNITED STATES		
Goods/Services Subject to Cancellation	Class 005. First Use: 1999/04/25 , First Use In Commerce: 1999/04/25 Goods/Services:		
Registration No	2448112	Registration date	05/01/2001
Registrant	CORNERSTONE BIOPHARMA, INC. 2000 REGENCY PARKWAY, SUITE 255 CARY, NC 27518 UNITED STATES		
Goods/Services Subject to Cancellation	Class 005. First Use: 1998/05/01 , First Use In Commerce: 1998/05/01 Goods/Services:		
Grounds for Cancellation	The registration was obtained fraudulently.		

In the matter of Trademark Application Serial No. 77/226,994
Filed: July 11, 2007
Mark: VISRX
Published in the Official Gazette: December 25, 2007

CORNERSTONE BIOPHARMA, INC.,
)
)
 Opposer,
)
)
 v.) Opposition No. 91182604
)
 VISION PHARMA, LLC,
)
)
 Applicant.)

Applicant, Vision Pharma LLC (“Vision Pharma” or “Applicant”), respectfully submits this Answer to the Notice of Opposition filed by Opposer, Cornerstone BioPharma, Inc., (“Cornerstone” or “Opposer”).

1. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the *Notice of Opposition* and therefore denies the same.
2. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the *Notice of Opposition* and therefore denies the same.

3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 of the *Notice of Opposition* and therefore denies the same.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of the *Notice of Opposition* and therefore denies the same.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 of the *Notice of Opposition* and therefore denies the same.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6 of the *Notice of Opposition* and therefore denies the same.

7. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of the *Notice of Opposition* and therefore denies the same.

8. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 8 of the *Notice of Opposition* and therefore denies the same.

9. Applicant admits the allegations of Paragraph 9 of the *Notice of Opposition*.

10. Applicant admits the allegations of Paragraph 10 of the *Notice of Opposition*.

11. Applicant denies the allegations in the first sentence of Paragraph 11 of the *Notice of Opposition*. Applicant admits the remaining allegations of Paragraph 11 of the *Notice of Opposition*.

12. Applicant denies the allegations of Paragraph 12 of the *Notice of Opposition*.

13. Applicant denies the allegations of Paragraph 13 of the *Notice of Opposition*.

14. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 of the *Notice of Opposition* and therefore denies the same.

15. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 of the *Notice of Opposition* and therefore denies the same.

16. Applicant admits the allegations in the first sentence of Paragraph 16 of the *Notice of Opposition*. Applicant denies the allegations in the second and third sentences of Paragraph 16 of the *Notice of Opposition*.

17. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 of the *Notice of Opposition* and therefore denies the same.

18. Applicant denies the allegations of Paragraph 18 of the *Notice of Opposition*.

19. Applicant denies the allegations of Paragraph 19 of the *Notice of Opposition*.

20. Applicant denies the allegations of Paragraph 20 of the *Notice of Opposition*.

21. Applicant denies the allegations of Paragraph 21 of the *Notice of Opposition*.

22. Applicant denies the allegations of Paragraph 22 of the *Notice of Opposition*.

DEFENSES AND AFFIRMATIVE DEFENSES

23. Opposer has failed to state a claim on which relief can be granted.
24. Opposer's cited mark is unenforceable by virtue of being a descriptive mark lacking in secondary meaning.

COUNTERCLAIMS

COUNT I: CANCELLATION OF REG. NO. 3,384,232

1. Vision Pharma hereby petitions to cancel U.S. Reg. No. 3,384,232, dated February 8, 2008, for the mark ALLERX (stylized) owned by Cornerstone. As grounds for this petition, it is alleged that:
 2. Vision Pharma is a pharmaceutical company that manufactures and distributes pharmaceuticals. Since 2003, Vision Pharma has been in the business of offering for sale and selling pharmaceutical products, including, *inter alia*, medications directed to the relief of allergy symptoms.
 3. The concatenated term "ALLERX" is comprised of the prefix ALLE and the abbreviation RX. The prefix ALLE comprises the first four letters of the word "allergy" and its derivatives, "allergic" and "allergen." RX is the accepted abbreviation for prescriptions and/or medication. When ALLERX is used in the context of the goods covered by Cornerstone's registration, namely "anti-allergy preparations; antihistamine preparations; and decongestant preparations" in Int. Class 5, it immediately conveys to consumers and potential consumers that Cornerstone's goods are medications directed to relieving allergy symptoms.

4. As used in the subject mark, the term ALLERX is descriptive and has not attained secondary meaning as a source-identifier for Cornerstone's goods. Cornerstone's ALLERX mark immediately conveys information of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods with which it is used.

5. Vision Pharma has a real interest in the registered ALLERX mark for use on or in connection with the described goods, since such registration interferes with Vision Pharma's right to the lawful descriptive use of the prefix ALLE and to the term RX to refer to Vision Pharma's goods, particularly Vision Pharma's medications directed to the relief of allergy symptoms.

6. Thus, Cornerstone's registration should be canceled on the basis that the mark made the subject of this registration is descriptive and has not become distinctive of Cornerstone's goods.

7. Accordingly, Vision Pharma asserts, pursuant to 15 U.S.C. § 1064, that it is or will be damaged by Cornerstone's registration of the ALLERX mark subject of U.S. Reg. No. 3,384,232.

COUNT II: CANCELLATION OF REG. NO. 2,448,112

8. Vision Pharma hereby petitions to cancel U.S. Reg. No. 2,448,112, dated May 1, 2001, for the mark ALLERX owned by Cornerstone. As grounds for this petition, it is alleged that:

9. The assignment of title of the ALLERX registration covering “dietary and nutritional supplements” in International Class 5 from Naturally Scientific, Inc. to Cornerstone was recorded with the U.S. Patent and Trademark Office on January 26, 2007.

10. Cornerstone has not used and currently does not use the ALLERX mark in commerce in association with dietary and nutritional supplements.

11. Yet, on October 29, 2007, Cornerstone submitted its Section 8 Affidavit for the ALLERX mark, which included a sworn statement that it was using the ALLERX mark in commerce in association with dietary and nutritional supplements. The Section 8 Affidavit was accepted by the U.S. Patent and Trademark Office on November 10, 2007.

12. Cornerstone’s representation that it was using the ALLERX mark in commerce in association with dietary and nutritional supplements as of October 29, 2007 was false when made, Cornerstone knew the statement was false when made or should have known that the statement was false when made, and the U.S. Patent and Trademark Office relied upon but should not have relied upon the Section 8 affidavit to its harm and to the harm of consumers, including Vision Pharma.

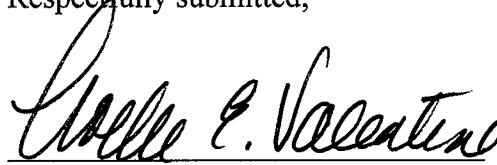
13. Cornerstone’s representation to the U.S. Patent and Trademark Office described herein pertaining to the use of the ALLERX mark in commerce in association with dietary and nutritional supplements was false and constituted fraud on the U.S. Patent and Trademark Office, pursuant to *Medinol v. Neuro Vasx, Inc.*, 67 USPQ2d 1205 (TTAB 2003) and related caselaw.

14. Because of Cornerstone's fraud on the U.S. Patent and Trademark Office during the course of the maintenance of the ALLERX registration, U.S. Reg. No. 2,448,112, is void *ab initio* and should be cancelled and stricken from the Principal Register.

WHEREFORE, Vision Pharma requests that the Board dismiss the *Notice of Opposition* filed in this proceeding and that Application Serial No. 77/226,994 for the mark VISRX be approved for registration, that Vision Pharma's counterclaim for cancellation of Cornerstone's U.S. Reg. No. 3,384,232 be granted pursuant to 15 U.S.C. § 1064 and that U.S. Reg. No. 3,384,232 be cancelled, and that Vision Pharma's counterclaim for cancellation of Cornerstone's U.S. Reg. No. 2,448,112 for the mark ALLERX be granted and that U.S. Reg. No. 2,448,112 be cancelled.

Dated: April 2nd, 2008

Respectfully submitted,



Jason M. Sneed
Noelle T. Valentine
Benjamin F. Sidbury
Alston & Bird LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel.: (704) 444-1000
Fax: (704) 444-1111
Email: jason.sneed@alston.com;
ben.sidbury@alston.com ; noelle.valentine@alston.com

Attorneys for Applicant,
Vision Pharma LLC

CERTIFICATE OF FILING

The undersigned hereby certifies that on this 2nd day of April, 2008, the Answer to Notice of Opposition and Counterclaims was filed with the Board by electronic means through the Board's ESTTA system.

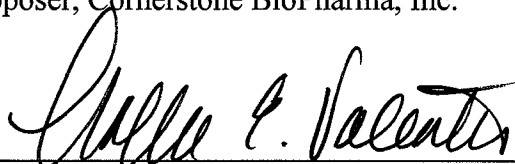


An Attorney for Applicant/Counterclaims
Petitioner, Vision Pharma, LLC
Date of Execution: April 2nd, 2008

CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that on this 2nd day of April, 2008, a copy of the foregoing Answer to Notice of Opposition and Counterclaims was filed by placing a copy in U.S. mail, postage prepaid, and addressed to the following:

Robert J. Morris
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP
2500 Wachovia Capitol Center
P.O. Box 2611
Raleigh, NC 27602-2611
Attorneys for Opposer, Cornerstone BioPharma, Inc.



An Attorney for Applicant/Counterclaims Petitioner,
Vision Pharma, LLC